

**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Establishment of a Class A Television
Service)

MM Docket No. 00-10

MM Docket No. 99-292

RM-9260

To: The Commission

JOINT COMMENTS

SCHWARTZ, WOODS & MILLER

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Suite 300

Washington, D.C. 20036-1717

On Behalf Of

Connecticut Public Broadcasting, Inc.
Educational Television Association of Metropolitan Cleveland, Inc.
Mississippi Authority for Educational Television
New Jersey Public Broadcasting Authority
Northern California Educational Television Association, Inc.
North Texas Public Broadcasting, Inc.
University of New Hampshire
University of North Carolina
Western New York Public Broadcasting Association
WMHT Educational Telecommunications

February 10, 2000

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JOINT COMMENTS

Schwartz, Woods & Miller, on behalf of the public broadcast licensees listed in Attachment A (Joint Parties) and pursuant to Section 1.415 of the rules, hereby files these comments in response to the Order and Notice of Proposed Rule Making (Notice) released January 13, 2000 (FCC 00-16) proposing to create "Class A" status expanding interference protection for certain low power television (LPTV) and television translator stations. In support thereof, the following is shown:

A. Background

1. The Joint Parties are licensees of public television facilities in many communities and areas throughout the United States. For decades, they have provided cardinal noncommercial educational service in furtherance of their collective mission to inform, educate and entertain the American public. This service includes nationally-originated fare from the Public Broadcast Service (PBS) and American Public Television as well as substantial amounts of locally-produced programming. Public television continues to afford the public with the only freely-available over-the-air program service alternative to commercial television fare. It should also be stressed that the Joint Parties provide an array of children's informational programming for many hours each day in addition to other programming of cultural, educational and informational

interest to their viewers. All of this programming is aired on a noncommercial educational basis.

2. In order to provide the maximum possible coverage of their audiences, the Joint Parties rely upon translator facilities to assure adequate reception of their public broadcast program fare. Most of these translator operations are located within the Joint Parties' Grade A or Grade B contours, providing fill-in coverage where terrain and other factors preclude actual provision of predicted city grade or Grade B coverage. Some of these operations are located outside their Grade B contours and provide the only local public television signal to unserved areas. For the Joint Parties which operate public broadcast networks providing statewide public broadcast service utilizing a combination of flagship, satellite and translator facilities, these translator operations are the only means to provide viewers with a public broadcast signal within statewide service areas. For the other Joint Parties, translator operations likewise enhance and extend their public broadcast service to areas within their markets. It should also be noted that some of the Joint Parties operate public LPTV stations which likewise provide noncommercial educational television service. Under all of these circumstances, the Joint Parties are vitally concerned that the Commission's proposal, now mandated by Congress pursuant to the Community Broadcasters Protection Act of 1999 with respect to qualifying LPTV facilities, should be crafted so as to provide Class A protection as well for public broadcast licensees operating noncommercial translator stations that rebroadcast their public television programming and for public broadcast licensees operating noncommercial LPTV stations. In this regard, the Joint Parties observe that the Commission itself has acknowledged its statutory discretion to establish alternative

eligibility criteria for Class A designation if it determines that “the public interest, convenience and necessity would be served by treating the station as a qualifying low-power television station for purposes of this section, or for other reasons determined by the Commission.” (Notice, par.21; 47 U.S.C. Section 336(f)(2)(B)). The FCC invites comment “on the circumstances that might warrant a determination that a station that does not meet the [statutory] eligibility criteria . . . nonetheless should be considered qualified for Class A status.” (Notice, para. 21).

B. Eligibility Issues

3. On November 29, 1999, the President signed into law the Community Broadcasters Protection Act of 1999 (the Act). Among other things, the Act provides for qualifying LPTV stations to secure Class A status which will give them technical protection equivalent to that accorded full service TV stations. A “qualifying” LPTV station is one that, during the 90-day period preceding enactment of the Act: (1) broadcast a minimum of 18 hours a day; (2) broadcast an average of at least three hours per week of programming “that was produced within the market area served by such station, or the market area served by a group of commonly controlled low-power stations that carry common local programming produced within the market area served by such group”; and (3) was otherwise in compliance with the FCC’s requirements applicable to LPTV stations. Section 5008(f)(2)(B) of the Act further gives the Commission discretion to treat other stations which do not meet these specific criteria as “qualified” for Class A status if it “determines that the public interest. . . would be served by treating the station as a qualifying low-power station.” The Commission accordingly has ample authority to

adopt implementing regulations which provide reasonable and effective protection for public television translator operations consistent with the Act.

4. The Joint Parties urge the Commission to adopt regulations pursuant to either Section 5008(f)(2)(A) or 5008(f)(2)(B) of the Act that designate their translator operations as “qualified” for the purpose of securing Class A status. Preliminarily, the Joint Parties observe that their translator facilities rebroadcast substantial amounts of programming produced by their respective flagship facilities; as such, the Joint Parties submit that they satisfy the “market area program production” test of Section 5008(f)(2)(A) of the Act. Nonetheless, to the extent required, the Joint Parties urge the Commission to confirm that their flagship/translator operations satisfy this provision. The Joint Parties likewise urge that the Commission rule that noncommercial LPTV operations which may not broadcast at least three hours per week of locally produced programming are nonetheless eligible for Class A status by virtue of their noncommercial educational operation.¹ In addition, the Joint Parties observe that, while the Act’s criterion requiring operation 18 hours per day may be appropriate in some circumstances, that requirement in fact far exceeds the basic requirements of the Section 73.1740 of the rules regarding minimum television station operating schedules. Many, but not all, public broadcasters operate at least 18 hours per day every day of the year. Those that do not operate 18 hours per day nonetheless generally provide substantial

¹In this regard, the Commission’s “Statement of Eligibility for Class A Low Power Television Station Status” expressly contemplates that such facilities may, upon a proper showing, be deemed eligible for Class A status pursuant to the administrative discretion afforded the Commission by the Act. The Joint Parties believe that provision of noncommercial service by a nonprofit licensee should warrant a Commission determination that a certificate of eligibility would serve the public interest.

and unique public broadcast service at levels near the 18-hour benchmark. Under the circumstances, the Joint Parties strongly believe that the 18-hour benchmark as applied to public broadcast operations would be unfair and request that the Commission adopt a rule that public broadcasters' translator facilities meeting the minimum operating requirements for full-service television stations are eligible for Class A status.

5. To the extent that Section 5008(f)(2)(A) may not fully embrace public broadcast translator operations, the Joint Parties urge the Commission pursuant to Section 5008(f)(2)(B) to extend Class A eligibility to any translator station licensed to a full-service public broadcast licensee which rebroadcasts the full-service facility's schedule and complies with the minimum operating schedule for television stations. The Joint Parties believe that sound public policy considerations compel the conclusion that the public interest would be served by treating translators rebroadcasting their parent public television stations as Class A facilities. In this regard, the Joint Parties do not believe that there is any need to consider the specific content of their program service; the Commission's concerns in this regard (Notice, para. 19-20), while possibly appropriate in the context of commercial LPTV facilities, are inapposite in the context of noncommercial educational program service such as that provided by the Joint Parties. As shown above, these facilities provide a unique program service which justifies regulatory treatment different from whatever regime the Commission decides to apply to commercial LPTV licensees. In this regard, there is ample precedent for distinctive treatment of noncommercial educational licensees based on their distinctive programming fare. So, for example, the Commission determined that the overwhelming evidence of public broadcasters' provision of substantial amounts of children's

programming warranted their exemption from the detailed documentation requirements applied to their commercial counterparts when it adopted regulations implementing the Childrens' Television Act of 1990. See, Memorandum Opinion and Order, MM Docket 90-570, released August 26, 1991 (FCC 91-248), par. 45. More recently, the Commission determined not to require noncommercial educational licensees to retain or summarize letters from the public concerning "violent" programming because reports regarding such programming have raised little concern in the case of noncommercial educational television stations. See, Report and Order, MM Docket 97-138, released August 11, 1998 (FCC 98-175), para. 56; Memorandum Opinion and Order, MM Docket 97-138, released May 28, 1999 (FCC 99-118), para. 37. The Commission should similarly conclude that the distinctive programming fare provided by public broadcast licensees either automatically satisfies whatever programmatic test the Commission may decide to adopt as a criterion of Class A eligibility or justifies an exemption from it.²

C. Protection Issues

6. The Joint Parties urge the Commission to continue to require full protection of NTSC facilities, including pending applications, construction permits and operating stations, and accordingly oppose its proposal (Notice, paras. 27-28) not to protect applications. NTSC service will remain the dominant mode of television service for some years to come. As the Commission observes (Notice, para. 28), many NTSC

²While the Joint Parties believe that their noncommercial educational status alone should make their translator facilities eligible for Class A status, should the Commission decide to apply some local program production requirement, they urge it to rule that programming produced by flagship facilities for rebroadcast by their translators would count toward satisfaction of any local programming requirement.

applications for new service have been pending for years. These applications both protect and are protected against new full service analog applications. The Joint Parties submit that elimination of protection for these proposals would be inconsistent with the public interest in continued expansion of full NTSC service. The phrase "transmitting in analog format" in Section 5008 (f)(7)(A) is sufficiently broad to embrace analog stations transmitting, authorized to transmit or proposing to transmit in analog format. At the same time, the Joint Parties support the Commission's proposal (Notice, para. 29) to require Class A stations to continue to protect full-service NTSC operations in accordance with current requirements, while agreeing that use of models such as Longley-Rice may be appropriate. With respect to paragraph 30 of the FCC's Notice, the Joint Parties desire assurance from the FCC that protection of DTV broadcasters by Class A stations must embrace not only service replication but also the full extent of DTV maximization set forth in notices of intent to maximize DTV facilities filed with the FCC by December 31, 1999 or DTV applications pending as of that date.

7. The Joint Parties are vitally concerned that their future DTV operations be fully protected by Class A LPTV facilities. DTV service has been made the linchpin of future broadcast service to the public. The Commission should adopt its proposal (Notice, para. 33) to require Class A applicants to protect all other stations seeking to replicate or maximize DTV power which have complied with applicable notification requirements. The onus of solving "technical problems" should rest squarely with Class A applicants. Similarly, in response to the Commission's query (Notice, para. 34), the Joint Parties believe that full service licensees' use of their NTSC channels subsequently for DTV service should and must be fully protected. The principles underlying

the FCC's DTV policies guaranteed that stations could revert to their analog channel (or a new in-core channel once that channel has been assigned) at the end of the transition period. This right is meaningless unless such reversionary right also preserves the right to maximize on the analog or in-core channel in the same manner as on the allotted digital channel. The Joint Parties also believe that, in response to paragraph 37 of the FCC's Notice, a station requesting an adjustment to the DTV Table should have priority where such a proposal would impinge upon the service area of a Class A station. In such cases, the normal displacement policies should be applicable with respect to the Class A station, provided that interference protection requirements have been satisfied by the Class A station.

8. The Joint Parties are also concerned that the regulatory scheme envisioned by the Commission for the licensing of Class A LPTV stations (Notice, paras. 42-43) may not assure that required protection by Class A LPTV applicants of present and prospective full-service operations will be subject to adequate verification and appropriate review by interested parties. In this regard, they seek clarification concerning the extent to which the applications (whether FCC Form 301 or 346) filed by Class A LPTV applicants will be required to demonstrate protection of full service facilities. Further, since the Commission and the Act envision swift action on Class A LPTV applications, it is essential that interested parties be provided adequate public notice of these filings in order to permit a reasonable time for review and comment and, if necessary, opposition to the proposed Class A LPTV application.

9. The Joint Parties firmly believe that the cooperation between Class A LPTV applicants and area full service television stations will be needed in order to implement


in an effective manner the Class A LPTV policies envisaged by the Act. In this connection, the Joint Parties urge the FCC to support the adoption of private interference agreements between Class A LPTV applicants and area full service television stations. At the same time, however, the Joint Parties believe that the FCC should confirm that existing LPTV/full service television station agreements may not be used in support of an applicant's request for Class A LPTV status.

WHEREFORE, for the foregoing reasons, the Joint Parties respectfully urge the Commission to adopt regulations establishing translator eligibility for Class A status, and to adopt Class A LPTV rules, consistent with these Comments.

Respectfully submitted,

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202/833-1700

Its Attorneys

February 10, 2000

ATTACHMENT A

Connecticut Public Broadcasting, Inc.

WEDH(TV), Hartford, CT
WEDN(TV), Norwich, CT
WEDW(TV), Bridgeport, CT
WEDY(TV), New Haven, CT
Translator W12BH

Educational Television Association of Metropolitan Cleveland

WVIZ-TV, Cleveland, OH
Translator W64AK
Translator W67AL

Mississippi Authority for Educational Television

WMAA(TV), Columbus, MS
WMPN-TV, Jackson, MS
WMAB-TV, Mississippi State, MS
WMAE-TV, Booneville, MS
WMAH-TV, Biloxi, MS
WMAO-TV, Greenwood, MS
WMAU-TV, Bude, MS
WMAV-TV, Oxford, MS
WMAW-TV, Meridian, MS
Translator W45AA
Translator W47BP

New Jersey Public Broadcasting Authority

WNJT-TV, Trenton, NJ
WNJN(TV), Montclair, NJ
WNJB(TV), New Brunswick, NJ
WNJS(TV), Camden, NJ
Translator W25BB
Translator W36AZ
Translator W49BE
Translator W55BS

Northern California Educational Television Association, Inc.

KIXE-TV, Redding, CA
Translator K02HC
Translator K06GR
Translator K13IT
Translator K13IV
Translator K14HX
Translator K20DE
Translator K28CY
Translator K28DB
Translator K35DE
Translator K39DG

North Texas Public Broadcasting, Inc.

KERA-TV, Dallas, TX
KDTN(TV), Denton, TX
Translator K24AD

University of New Hampshire

WEKW-TV, Keene, NH
WENH-TV, Durham, NH
WLED-TV, Littleton, NH
Translator W15BK
Translator W18BO

University of North Carolina Center for Public Television

WUNC-TV, Chapel Hill, NC
WUND-TV, Columbia, NC
WUNE-TV, Linville, NC
WUNF-TV, Asheville, NC
WUNG-TV, Concord, NC
WUNJ-TV, Wilmington, NC
WUNK-TV, Greenville, NC
WUNL-TV, Winston-Salem, NC
WUNM-TV, Jacksonville, NC
WUNP-TV, Roanoke Rapids, NC
WUNU(TV), Lumberton, NC

Translator W05AU
Translator W23AF
Translator W24AU
Translator W24BA
Translator W25AY
Translator W27AB
Translator W27AO
Translator W27AX
Translator W27BD
Translator W27BF
Translator W28AN
Translator W28AO

Translator W31AN
Translator W35AD
Translator W42AT
Translator W42AX
Translator W43AU
Translator W46AX
Translator W52BA
Translator W56AG
Translator W59AD
Translator W59AK
Translator W59AR

Western New York Public Broadcasting Association

WNED/AM/FM/TV, Buffalo, NY

WNEQ-TV, Buffalo, NY

WNJA(FM), Jamestown, NY

Translator W46BA

Translator W56AD

Translator W56AU

Translator W56AV

Translator W59AH

Translator W60AC

Translator W60AJ

Translator W61AJ

Translator W62AD

Translator W62AE

Translator W62AG

Translator W62AQ

Translator W62AS

Translator W64AF

Translator W64AJ

Translator W65AJ

Translator W68AJ

WMHT Educational Telecommunications

WMHT-TV/FM, Schenectady, NY

WMHQ(TV), Schenectady, NY

Translator W04AJ

Translator W04BD